

No. 14657

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United States  
Court of Appeals  
For the Ninth Circuit.

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EXCHANGE LEMON PRODUCTS COMPANY,  
a Corporation,

Appellant,

vs.

THE HOME INSURANCE COMPANY,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

MAY - 2 1955



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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Corona, California.

For Appellee:

THOMAS P. MENZIES,  
JAMES O. WHITE, JR.,  
HAROLD L. WATT,  
803 Rowan Bldg.,  
458 S. Spring St.,  
Los Angeles 13, Calif.





In the District Court of the United States, Southern  
District of California, Central Division

No. 13878-WB

THE HOME INSURANCE COMPANY, a Corporation,  
ration,

Plaintiff,

vs.

THE EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,  
PANY, a Corporation,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

I.

That this Court has jurisdiction over the above-entitled action by reason of the following facts, the particulars of which are hereinafter more fully alleged:

A diversity of citizenship exists between plaintiff and the defendant and the amount involved in this action is in excess of \$3,000.00 exclusive of interest and costs of suit.

II.

That the plaintiff, The Home Insurance Company, is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York and was and is a citizen and resident of the State of New York, and [2\*] is now and was at all times

**\*Page numbering appearing at foot of page of original Certified Transcript of Record.**

herein mentioned authorized to do business in the State of California and to write policies of insurance in said State of California at all times hereinafter mentioned.

### III.

That the defendant, The Exchange Lemon Products Company, is now and at all of the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and was at all of the times hereinafter mentioned a citizen and resident of the State of California, and is now and at all of the times hereinafter mentioned authorized to and was actually engaged in business in the State of California.

### IV.

That by reason of the facts hereinafter alleged there is diversity of citizenship between plaintiff and the defendant above mentioned.

### V.

That the amount in controversy in this action exceeds the sum of \$3,000.00 exclusive of interest and costs.

### VI.

That on to wit, April 23, 1946, plaintiff, The Home Insurance Company, issued its Standard California Transportation Policy No. TR 338460 whereby, for the period from the first day of May, 1946, and continuously thereafter until cancelled at any time at the request of the Assured or by the Company by giving fifteen days' notice in writing

of cancellation, it insured defendant, The Exchange Lemon Products Company, subject to the terms and conditions of said policy, against loss or damage in the amount of \$175,000.00 by Flood among other causes on loss of goods and merchandise, consisting principally of Essential Oils, Pectin, Fruit Juices and Citrus Fruit By-Products, the property of the Assured, or in which the Assured had an insurable interest. That said policy provided among other things: [3]

“The policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage.”

## VII.

That thereafter, by written endorsement dated October 1st, 1951, and attached to and forming a part of said Policy No. TR 338460, it was agreed that the Company's liability is not to exceed \$200,000.00 on account of claims arising out of any common disaster and/or catastrophe at any time and/or location, all other terms and conditions of said policy remaining unchanged. That said policy continued in full force and effect at all times herein mentioned.

## VIII.

That on July 13, 1951, a large and substantial stock of Citrus Fruit By-Products of the asserted value of \$161,991.63, held for the account of the defendant (Assured) in Crooks Terminal Warehouse in Kansas City, Missouri, was allegedly lost by reason of a flood.

That an actual controversy has arisen between the plaintiff and the defendant as to whether said Citrus Fruit By-Products were in due course of transit within the meaning and terms of said policy at the time of said alleged loss.

## IX.

That plaintiff has commenced this action and made the averments hereinbefore set forth in good faith and desires to have its rights and liabilities under said policy of insurance construed and determined to the end that it may proceed with the payment of the loss under its policy, if it is legally liable therefor. [4]

Wherefore, plaintiff prays judgment and for an order and decree herein to the end that plaintiff may obtain relief in the premises and declaratory judgment as follows:

(1) For a declaration by this Court of the respective rights and duties and liabilities of the plaintiff and defendant upon the policy of insurance issued by the plaintiff and which are in this complaint described.

(2) That it be declared and adjudged by this Court whether the property damaged as alleged was in due course of transit at the time of said loss in such a manner that the loss clause of plaintiff's said policy applied and is effective.

(3) Plaintiff prays for such other and further relief as to this Honorable Court shall seem just and equitable, and for costs of suit herein.

Dated this 3rd day of March, 1952.

/s/ THOMAS P. MENZIES,  
Attorney for Plaintiff.

[Endorsed]: Filed March 3, 1952. [5]

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[Title of District Court and Cause.]

### DEMAND FOR JURY TRIAL

Pursuant to Rule 38 (c), defendant hereby demands a jury trial of all issues raised by the complaint, answer and counterclaim in the above-entitled matter.

Dated this 15th day of April, 1952.

CLAYSON & STARK,  
By /s/ DONALD D. STARK,  
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 15, 1952. [10]

[Title of District Court and Cause.]

### AMENDED ANSWER

Comes now defendant Exchange Lemon Products Company, a corporation, sued herein as The Exchange Lemon Products Company, a corporation, and for answer to plaintiff's complaint, admits, denies and alleges:

#### I.

Admits the allegations contained in Paragraphs I, II, III, IV and V of the complaint.

#### II.

Answering Paragraph VI of the complaint defendant alleges that the term "in due course of transit" has a trade usage in the transportation trade, to wit: shipped in compliance with the transit privilege provisions of the railway tariffs authorized by the Interstate Commerce Commission, which includes what is known as "in transit storage" or "stoppage in transit" [13] as distinguished from local or terminal storage. Defendant further alleges that the phrase "but only while in due course of transit and not if such property is in storage" means, as a matter of trade usage, "only while in due course of transit within the scope of the railway tariff and not if in local or terminal storage."

Defendant further alleges in answer to said paragraph that said insurance policy was negotiated between James S. Jennings, plaintiff's agent, and Thomas C. Borden, defendant's traffic manager, and

that both of said persons knew of said trade meaning of the term "due course of transit" and discussed the same in connection with negotiations for said policy.

III.

Admits the allegations in Paragraph VII of the complaint.

IV.

Answering Paragraph VIII of the complaint defendant alleges that said goods destroyed in Crooks Terminal Warehouse were stored under the transit privilege provisions of said railway tariffs and that the same were in due course of transit within the said trade meaning of said term.

V.

For want of information or belief, defendant denies each and every allegation in Paragraph IX.

Wherefore, defendant demands:

1. A declaration that the said property damaged and destroyed was insured by said policy, and that plaintiff is therefore, obligated to pay said insured loss to defendant;

2. Judgment against plaintiff in the amount of \$161,991.63, together with interest thereon from July 13, 1951; [14]

3. All other appropriate relief, together with defendant's costs of suit herein.

Dated this 9th day of January, 1953.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Defendant.

Affidavit of Service by Mail attached.

Lodged January 10, 1953. [15]

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[Title of District Court and Cause.]

#### AMENDED COUNTERCLAIM

Defendant Exchange Lemon Products Company complains of Plaintiff The Home Insurance Company and for cause of action by way of counterclaim alleges:

##### I.

That on April 23, 1946, plaintiff, The Home Insurance Company, issued its transportation policy No. TR 338460 whereby, for the period from the 1st day of May, 1946, and continuously thereafter until canceled at any time at the request of the defendant or by the plaintiff by giving fifteen days' notice in writing of cancellation, plaintiff insured defendant, Exchange Lemon Products Company, subject to the terms and conditions of said policy, against loss or damage in the amount of \$175,000.00, by flood, among other causes, on loss of goods and merchandise, consisting principally of Essential Oils, Pectin, Fruit, Juices, [17] and Citrus Fruit



By-Products, the property of the defendant or in which the defendant had an insurable interest, or property which the defendant was covering for benefit of consignee even though merchandise may have been paid for and title passed to consignee, the interest of the defendant being that of a bailee for customer's goods.

II.

That on or about July 13, 1951, while said insurance policy was in full force and effect, a large and substantial stock of Citrus Fruit By-Products, subject to said Policy No. TR 338460, of the value of \$161,991.63, was lost and totally destroyed by reason of a flood while said stock was located in Crooks Terminal Warehouse in Kansas City, Missouri, and while said stocks were in the due course of transit within the meaning of said policy.

III.

That said stock of Citrus Fruit By-Products, and the loss thereof, were insured by the provisions of said insurance policy, and more specifically, were insured by the following provision in said policy.

“This policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage.”

## IV.

Defendant alleges that the term "in due course of transit" has a trade usage in the transportation trade, to wit: shipped in compliance with the transit privilege provisions of the [18] railway tariffs authorized by the Interstate Commerce Commission, which includes what is known as "in transit storage" or "stoppage in transit" as distinguished from local or terminal storage. Defendant further alleges that the phrase "but only while in due course of transit and not if such property is in storage" means as a matter of trade usage, "only while in due course of transit within the scope of the railway tariff and not if in local or terminal storage." Defendant further alleges that the said goods destroyed on July 13, 1951, were stored under the transit privilege provisions of said railway tariffs.

Defendant further alleges that said insurance policy was negotiated between James S. Jennings, plaintiff's agent, and Thomas C. Borden, defendant's traffic manager, and that both of said persons knew of said trade meaning of the term "due course of transit" and discussed the same in connection with negotiations for said policy.

## V.

That on or about September 21, 1951, defendant furnished the plaintiff with proof of its loss, and otherwise performed all the conditions of the said policy on its part.

## VI.

That although defendant furnished the plaintiff with said proof of loss and demanded of the plain-

tiff the sum of \$161,991.63, the value of the stock of Citrus Fruit By-Products lost by reason of flood as aforesaid, the plaintiff has not paid the same, nor any part thereof, and the whole thereof is due and unpaid from the plaintiff to the defendant.

Wherefore, defendant demands:

1. A declaration that the said property damaged and destroyed was insured by said policy, and that plaintiff is therefore, obligated to pay said insured loss to defendant;
2. Judgment against plaintiff in the amount of \$161,991.63, [19] together with interest thereon from July 13, 1951;
3. All other appropriate relief, together with defendant's costs of suit herein.

Dated this 9th day of January, 1952.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Defendant.

[Endorsed]: Filed February 4, 1953. [20]

[Title of District Court and Cause.]

ANSWER TO AMENDED COUNTERCLAIM

Comes now plaintiff, The Home Insurance Company, a corporation, and for reply to defendant's amended counterclaim admits, denies and alleges:

I.

Admits the allegations in paragraph numbered I.

II.

Admits the allegations in paragraph numbered II except that it denies that said stock of said Citrus By-Products was lost or destroyed while said stocks were in the due course of transit within the meaning of said policy.

III.

Admits the allegations in paragraph numbered III.

IV.

Denies the allegations in paragraph numbered IV except [21] the allegation that said goods destroyed on July 13, 1951, were stored under the "transit privilege provisions of the said railway tariffs." Alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegation.

V.

Admits the allegations in paragraph numbered V except that the plaintiff denies that the defendant has performed the conditions of said policy on its part to be performed.

VI.

Answering paragraph numbered VI plaintiff admits that it has not paid defendant's demand or any part thereof, but denies that there is anything whatsoever due or unpaid, or due or unpaid, from plaintiff to defendant.

Second Defense

That said policy provided by its terms:

“This policy covers only while the property insured is in the due course of transit in the custody of:

“(a) Any railroad or railroad express company and connecting conveyances.

“(b) This policy also covers any movement by truck from warehouses or factories to points of loading, freight cars or freight depots.

“This policy also covers while on docks, wharves, piers, bulkheads, in depots, stations and/or on platforms, but only while in the custody of a common carrier incidental to transportation.

“This insurance attaches from the time the goods leave the factory, store or warehouse at initial point of shipment, and covers thereafter continuously, in due course of transportation, until same are delivered at store or warehouse at destination. [22]

“No officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written

upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.”

### Third Defense

That if the defendant's goods were damaged while in transit in the particulars in its amended counterclaim set out or otherwise, that the same were not in the due course of transit at the time of sustaining said loss or damage, if any, and were not in due course of transportation, but on the contrary had arrived at their destination.

Wherefore, plaintiff prays that defendant take nothing by its amended counterclaim, that the same be dismissed, and that plaintiff have judgment for costs, and for such other and further relief as is just and proper.

Dated this 29th day of January, 1953.

/s/ THOMAS P. MENZIES,  
Attorney for Plaintiff, The Home Insurance Com-  
pany, a Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 4, 1953. [23]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED  
PRE-TRIAL ORDER

At a conference held under Rule 16, F.R.C.P., by direction of Wm. Byrne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

(1) Plaintiff, The Home Insurance Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and was and is a citizen and resident of the State of New York, and is now at all times authorized to do business in the State of California and to write policies of insurance.

(2) The Defendant, Exchange Lemon Products Company, is a California corporation authorized to and actually engaged in business in the State of California.

(3) On April 23, 1946, the plaintiff issued its transportation policy in manner and form of the policy [25] attached to this order, marked Exhibit "A" and by reference made a part hereof. Said policy was received by the defendant on or about the date it bears, and was thereafter read and retained without objection by the defendant and is still in the possession of defendant.

(4) James S. Jennings was, on May 1, 1946, and for more than one year prior thereto, an agent of plaintiff.

(5) Said policy was in full force and effect according to its terms and conditions at the time of the loss.

(6) On July 13, 1951, citrus fruit by-products of the value of \$161,991.63 were held for the account of the defendant in Crooks Terminal Warehouse in Kansas City, Missouri, and had been so held for a period of from eight to ten months prior to said date.

On or about said July 13, 1951, a flood occurred which inundated said Crooks Terminal Warehouse and as a result of said flood said goods were totally destroyed. All of said goods so destroyed had been in said warehouse for a period of eight months or more prior to sustaining said damage.

(7) Said goods were shipped by way of Santa Fe Railway from Corona, California, to said Crooks Terminal Warehouse in Kansas City, Missouri, under bills of lading, copies of which are annexed hereto marked Exhibit "B." Title to said goods remained in defendant consignee at the time of their destruction by said flood. Said goods were situate in said warehouse awaiting future orders and at the time of their destruction no orders or shipping instructions in respect to the same had been received or issued by the defendant. [26]

(8) Within the time prescribed in said policy of insurance a proof of loss was filed by the defendant with the plaintiff and said claim has not been paid, or any part thereof, and after the receipt of said



proof of loss, the plaintiff made timely objections to said proof of loss.

(9) The applicable railway freight tariff during the period from their initial shipment from Corona, California, until their destruction was Western Trunk Lines Freight Tariff No. 403 B (Effective March 8, 1950), a copy of which is attached hereto, marked Exhibit "C," and by reference made a part hereof.

(10) The goods destroyed in said flood were carried on the records of Western Weighing and Inspection Bureau as transit freight. Photostat copies of said records are attached hereto, marked Exhibit "D" and by reference made a part hereof.

(11) The identical goods insured by plaintiff under its said transportation policy were also insured by plaintiff against loss by fire while in Crooks Terminal Warehouse under plaintiff's Home Provisional Stock Policy No. 901456.

#### Issues of Fact to Be Tried

1. If the Court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term "in due course of transit," [27]

(a) What was that trade meaning?

(b) Did James S. Jennings and Tom Borden, at or prior to the execution of said contract of insurance, have knowledge of such trade meaning of the term "in due course of transit"?

(c) Did James S. Jennings have authority to bind the plaintiff?

(d) Were the defendant's goods, which were destroyed in Crooks Terminal Warehouse "in due course of transit" within the meaning of said term?

(e) Were the defendant's goods "in storage" within the meaning of the contract?

(f) Was the ultimate destination of the goods determined at the time of their destruction?

#### Issues of Law

1. Is the defendant, Exchange Lemon Products Company, entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term "in due course of transit"?

2. Were the goods "in due course of transit" within the meaning of said policy at the time said goods were destroyed?

3. Were the goods "in storage" within the meaning of said policy at the time said goods were destroyed?

4. Was there any ambiguity in the terms of the policy defining the coverage afforded thereby?

The foregoing admissions of fact have been made by the [28] parties in open court at the pre-trial conference; and issues of fact and law being thereupon stated and agreed to, the Court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated this 25th day of March, 1954.

/s/ WM. M. BYRNE,  
Judge of the U. S. District  
Court.

The foregoing Pre-Trial Order is hereby approved.

/s/ THOMAS P. MENZIES,  
Attorney for Plaintiff.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Defendant. [29]



No. TR 388460

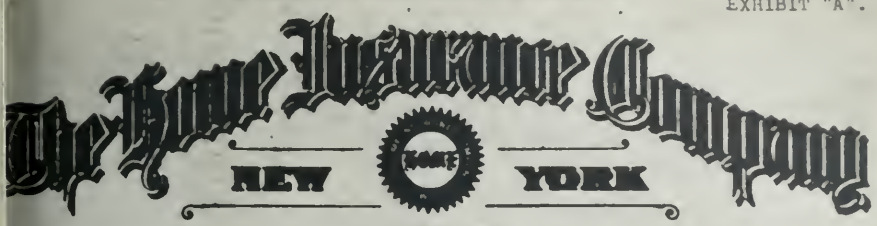
TRANSPORTATION POLICY

(A)

STOCK COMPANY

INLAND MARINE DEPARTMENT

EXHIBIT "A".



Amount \$ PER FORM ATTACHED Rate PER FORM ATTACHED DEPOSIT Premium \$ 100.00

BY THIS POLICY OF INSURANCE

IN CONSIDERATION OF THE STIPULATIONS AND CONDITIONS HEREIN AND

of ONE HUNDRED AND NO/100 Dollars/Premium

Does Insure THE EXCHANGE LEMON PRODUCTS COMPANY

Of CORONA CALIFORNIA

On all shipments as described herein made between the 1st day of May 1946 and beginning and ending with Noon, Standard Time at the place where this policy is countersigned.

The amount not exceeding PER FORM ATTACHED in any one casualty, either in case of partial or total loss, or salvage charges, or any other charges or expenses, or all combined.

Citrus Fruit by-Products and materials On lawful goods and merchandise consisting principally of used in their manufacture or packing the property of the assured, or held by them in trust or on commission or on consignment, or on which they have made advances or sold but not delivered, loss, if any, shall be to assured or order.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS AND TO THE CONDITIONS PRINTED ON THE BACK HEREOF WHICH ARE HEREBY SPECIALLY REFERRED TO AND MADE A PART OF THIS POLICY, BUT THIS POLICY SHALL NOT BE VALID UNLESS ENDORSEMENT A OR B IS ATTACHED HERETO, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no other agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the operative under this policy exist or be claimed by the assured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation

In Witness Whereof, this Company has executed and attested these presents this 23rd day of

May 1946 but this policy shall not be valid unless countersigned by the duly authorized Agent

of this Company at LOS ANGELES, CALIFORNIA

Handwritten signature of W. Payne

Handwritten signature of J. W. Smith, President

Countersigned this 23rd day of May 1946



TRANSPORTATION POLICY

This policy covers on lawful goods and merchandise consisting principally of Essential Oils, Pectin, Fruit Juices and Citrus Fruit By-products, the property of the Assured or is consigned to the Assured or Consignee, the interest of the Assured being that of a bailee for customers goods. Loss, if any, payable to the named Assured.

This policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, wharfs, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage.

THIS POLICY INSURES, except as hereinafter provided:

- I. While on land against loss or damage by (a) Fire, (b) Lightning, (c) Cyclone, (d) Tornado, (e) Flood, (f) Collision, (g) Collapse of bridges, (h) Derailment, (i) Upset or overturning of vehicles, (j) Theft, (k) Pilferage and/or Non-Delivery, (l) Strikes, riot and civil commotions, (m) Vandalism, malicious mischief and/or sabotage, (n) Rain, (o) Hail, (p) Windstorm, (q) Explosion, (r) Motor Vehicle, (s) Smoke, (t) Aircraft, (u) Sprinkler Leakage, (v) Leakage, (w) Earthquake, (x) Water, (y) Loading and unloading.
- II. While on ferries and/or on transfers or lighters while on inland waterways, in addition to items (a) to (y) inclusive, General Average claims and/or Marine Perils.

This insurance attaches from the time the goods leave the factory, store or warehouse (or are loaded for shipment) at initial point of shipment, and covers thereafter continuously in due course of transportation until same are unloaded at store or factory at destination. This policy covers both "incoming" and "outgoing" property.

THIS POLICY DOES NOT COVER:

- (a) Accounts, bills, currency, deeds, evidences of debt, money, notes or securities, (b) Fresh Fruits; (c) Export or Import shipments which are covered for Ocean Marine Insurance by this Company. (d) Fires by and unless specifically stated herein.

THIS POLICY DOES NOT INSURE AGAINST:

- (a) Loss or damage to goods by delay or by being spotted, discolored, moldy, rusted, frosted, rotted, soured, steamed, or changed in flavor, unless the same is a result of a peril insured against; (b) Loss or damage caused by the neglect of the Assured to use all reasonable means to save and preserve the property at and after any disaster insured against, or when the property is endangered by fire in neighboring premises; (c) Deterioration, inherent vice or loss of market.





This Company shall not be liable for any loss, caused directly or indirectly, by (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; or (b) invasion, insurrection, rebellion, revolution, civil war, usurped power; or (c) seizure or destruction under quarantine or Customs regulations, confiscation by order of any Government or Public Authority, or seizure of contraband or illegal transportation or trade.

It is understood and agreed that this policy covers shipments within the United States and/or Canada and/or Mexico, both to or from factories or warehouses of the Assured or to or from warehouses where the Assured maintains or may maintain stocks. It is understood and agreed that the liability of this Company under this policy shall not exceed the following limits of liability on any one railroad car or any one truck or any one location at any one time while (a) in the United States, \$175,000.00; (b) Canada, \$50,000.00; (c) Mexico, \$10,000.00.

**PREMIUM ADJUSTMENT AND REPORT OF SHIPMENTS.** The Assured warrants that at the end of each month they will report to this Company the actual value of all "sales" during the previous month's period, and upon the total of all reported sales the Assured agrees to pay this Company premium at the rate of 2¢ per \$100.00 of value. Such premium to become due and payable to this Company immediately upon the furnishing of such report of sales.

**SALES**—It is understood and agreed that "sales" shall be the gross sales of the Assured less sales of fresh fruit, and import or export shipments otherwise covered by Marine Insurance with this Company. It is understood and agreed this policy is not restricted in its coverage to property "sold" but is specifically extended to cover "incoming" and "outgoing" shipments, within the terms of the policy.

**RECORD OF SHIPMENT.** The Assured also agrees to keep a true record of all sales during this policy period and agrees to keep such record open to the inspection of representatives of this Insurance Company at all times during business hours.

**CANCELLATION.** This policy may be cancelled either by the Assured or by this Company upon giving 15 days notice in writing, and the Assured agrees to furnish this Insurance Company with an accurate statement showing a total value of all sales during the period covered by this policy, and further agrees to pay premium in this amount at the rate stated in the above Adjustment Clause. If the premium thus determined exceeds the initial premium paid, then amount of such excess shall immediately become due and payable to this Insurance Company, and per contra, any unearned premium (being the amount by which the initial premium exceeds the premium due), shall be returned to the Assured.

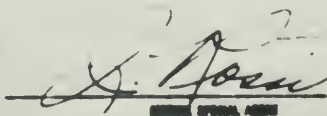
Cancellation of the strikes coverage granted under this policy may be made at any time by the Company giving 24 hours' notice of such cancellation, but strikes coverage shall continue on any property at risk under this policy at the time the cancellation of strikes coverage becomes effective.

**ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.**

Attached to and forming part of Policy No. TR 338460 of THE HOME INSURANCE COMPANY, N.Y.

Issued to THE EXCHANGE LEMON PRODUCTS COMPANY.

Dated at LOS ANGELES, CALIFORNIA  
MAY 1st, 1946.

  
J. J. Jones  
GENERAL AGENT



Endorsement No. 1

Pacific Marine Department

Endorsement

Additional Premium \$.....

Return Premium \$.....

Transportation Policy  
(Classification or Conveyance)

Effective: May 1st, 1946.

It is hereby understood and agreed that the clause entitled "Premium Adjustment and Report of Shipments" under the policy to which this endorsement is attached is changed to read as follows:

Premium Adjustment and Report of Shipments. The Assured warrants that at the end of each policy period they will report to this Company the actual value of all "sales" during the previous policy period, and upon the total of all reported sales the Assured agrees to pay this Company premium at the rate of 2 cents per \$100.00 of value. Such premium to become due and payable to this Company immediately upon the furnishing of such report of sales.

Sales—It is understood and agreed that "sales" shall be the gross sales of the Assured less sales of fresh fruit, and import or export shipments otherwise covered by Marine Insurance with this Company. It is understood and agreed that this policy is not restricted in its

coverage to property "sold" but is specifically extended to cover "incoming" and "outgoing" shipments, within the terms of the policy.

It is further understood and agreed that the deposit premium under this policy is increased to \$500.00.

Notwithstanding anything contained herein to the contrary, it is further understood and agreed that on shipments by railroad cars consigned to points and/or places in the United States and moving through Canada, this Company's limit of liability, subject to all the terms and conditions of the policy, is increased to \$175,000.00 while in Canada.

Accepted: The Exchange Lemon Products Company.

By /s/ R. M. TUTHILL.

All Other Terms and Conditions of This Policy  
Remain Unchanged

/s/ J. ROSSI,

Marine Special Agent.

Attached to and forms part of Policy No. TR 338460 of The Home Insurance Company, New York, issued to The Exchange Lemon Products Company.

Dated at Los Angeles, California, May 8th, 1946.

Jennings Ins. Agency. [31]

Endorsement No. 2

Pacific Marine Department

Endorsement

Additional Premium \$.....

Return Premium \$.....

Transportation Policy

(Classification or Conveyance)

Notwithstanding anything contained therein to the contrary, it is understood and agreed that the first report of the actual value of all sales under the policy to which this endorsement is attached shall cover the period from May 1st, 1946, to November 1st, 1946.

It is further understood and agreed that the Assured will report the actual value of all sales on November 1st, of each year thereafter, for the preceding year, instead of as provided for in the policy.

It is understood and agreed that the policy to which this endorsement is attached shall be continuous until cancelled.

All Other Terms and Conditions of This Policy  
Remain Unchanged

Attached to and forms part of Policy No. TR 338460 of The Home Insurance Company, New York, issued to The Exchange Lemon Products Company.

Dated at Los Angeles, California, October 31st, 1946.

Agent Jennings Insurance Agency.

/s/ J. ROSSI,

Marine Special Agent. [30]













THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—Coast Lines  
PREPAID FREIGHT BILL—ORIGINAL

FREIGHT BILL NO. 117

CAR INITIALS AND NUMBER SFRD 11407

DATE MAY 30th 1950 AT&SF 619

STATION

STATE

FROM

STATION

KANSAS CITY MO

12524

CORONA CALIF

SHIPPER EXCHANGE LEMON PROD CO

BELEN AT&SF  
UN PAC DEL'Y

TO THE ATCHISON TOPEKA AND SANTA FE RAILWAY CO.—COAST LINES DI.  
For Charges on Articles to be Transported

EXCHANGE LEMON PROD CO %  
CROOKS TERMINAL WAREHOUSE

INSTRUCTIONS (Regarding Loading, Ventilation, Heating, Milling, Weighing, Etc.)

INITIALLY ICED AT SANFERNARDINO  
DO NOT REICE RULE 240  
KEEP VENTS CLOSED TO DESTINATION

DESCRIPTION OF ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
10 CASES CITRUS FRUIT JUICE 48-6 SUGAR ADDED	66990	1.31	877.57		
REGISTERED FOR STORAGE IN TRANSIT	11500 LBS ICE	REFRGN LOL T SWG	15.87 23.23 .60		
#1878 ELF ORDER #319				TAX	917.27 27.52 944.79

MAID 5-31-50 VO #6118

WE CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL PREPAID FREIGHT BILL  
EXCHANGE LEMON PRODUCTS COMPANY

BY: *T. D. Forden*  
T. D. FORDEN, TRAFFIC MANAGER  
Federal Tax

Received Payment \_\_\_\_\_ 19 \_\_\_\_\_

Total to Collect \_\_\_\_\_

Agent



EXHIBIT C

Freight Tariff No. 403-B

\* \* \*

Note 3.—A transit station which is intermediate between origin and final destination via any authorized route in the applicable rate tariff will be considered intermediate between origin and final destination via all other authorized routes over which the same rate is applicable in the same rate tariff.

\* \* \*

Rules Governing Transit Privileges on Canned or Preserved Food Stuffs Shown Herein

Item No. 55—Subject: Application.

(a) The transit privileges will apply only on shipments that are completely unloaded from cars at transit station and only when loaded out of the same transit house into which the shipment was originally placed except in the case of an actual transfer as provided in Item 115, paragraph (a) thereof.

(b) Transit Privileges will Not apply on shipments forwarded from transit houses to points within the switching limits of the transit station.

(c) Not more than One stop for transit privilege will be permitted between origin and final destination of the transited shipments.

Item No. 60—Subject: Terms, Definition of.

(a) The terms “Carrier’s Agent” or “Carrier’s Representative” includes Western Weighing and Inspection Bureau, or other supervising agency of the carriers.

(b) The term “Freight Bill” will also include Tonnage Credit Slips as defined in Item 160.

(c) The term “Point of Origin” means the point from which the local (flat nor proportional) rate has been applied.

(d) The term “Transit Rate” means through rate from point of origin to destination, authorized in tariffs lawfully on file with the Interstate Commerce Commission on interstate traffic applying on shipments accorded transit privileges.

(e) The term “Transit Station” means station at which transit privileges are granted.

(f) The term “Non-Transit” means commodities originating at the transit station or commodities for which no freight bills are surrendered.

Item No. 65—Subject: Recording of Inbound Freight Bills.

(a) As evidence of intention to make use of transit privilege, inbound paid freight bills covering tonnage received at the transit station

must be presented to the carriers' agent for recording within 30 days from date of inbound freight bill issued at transit station.

(b) When freight bill is presented for recording, agent of the carrier must stamp or write thereon "Recorded for Transit," date and sign the endorsement and make record of the freight bill.

(c) Freight bills must be recorded separately according to the commodity which they represent.

(d) When, for any reason, the shipper desires to retain original freight bill, duplicate, thereof, will, upon request, be issued by the carrier's agent, which may be used in lieu of the original. In all such cases the original must be stamped or endorsed "Not Good for Transit" and the duplicate "Good for Transit." [67]

\* \* \*

Item No. 75—Subject: Furnishing, Storage, Facilities, Loading and Unloading.

Storage facilities must in all cases be furnished by consignee or his authorized agent and all loading and unloading of shipments must be done by and at expense of consignee or his authorized agent.

Item No. 80—Subject: Rates and Charges to Be Applied.

(a) The tariff rate from point of origin to

transit station will be assessed and charges collected accordingly.

(b) Rates from transit station to destination will be the difference between the rate assessed to the transit station and the transit rate applicable from point of origin to destination (see Paragraph c), plus additional charge, if any, for additional service, on basis of the transit weight, as authorized in lawfully published tariffs on file with the Interstate Commerce Commission.

(c) The through rate to be applied shall be the applicable rate in effect on date of shipment, viz.:

1. From point of origin to destination on the commodity into or out of the transit station, whichever is higher, or,

2. From point of origin to transit station on the commodity into the transit station, or,

3. From transit station to destination on the commodity out of the transit station, whichever is highest, plus transit charge and any other applicable charges, if any, as provided in tariff of carriers' parties hereto or their agent's lawfully on file with the Interstate Commerce Commission. [68]

\* \* \*



Supplement No. 25 to Freight Tariff No. 403-B

Rules Governing Transit Privileges Shown Herein

Rule

\* \* \*

Item No. 70-I—Subject: Time Limit.

Note 10—The time limit of freight bills covering shipments of Frozen Berries, Fruits and Vegetables and other articles as described in Section 2 of Item 50, transited at St. Louis, Mo., which under the provisions of this item or prior items, expire with or after September 14, 1949, but not later than September 29, 1949, is hereby extended for an additional period of one (1) year but not more than two (2) years from the date of billing from point of origin. Such freight bills must be presented to the carrier's agent prior to the expiration date and endorsed to secure additional time. For this extension an additional charge will be made equal to the difference in the rate in effect on date shipment left original shipping station and the rate in effect on date shipments leave the transit point, plus one (1) cent per 100 pounds for the extension. (Not Subject to Tariffs of Increased Rates and Charges Nos. X-162-166 Series Nor to Tariff of Increased Rates and Charges No. X-168-A as described in Item X-162-6-8, or successive issues thereof.)

\* \* \*

[Endorsed]: Filed March 25, 1954. [75]

[Title of District Court and Cause.]

### OFFER OF PROOF

The ruling of the Court, at the pretrial hearing on October 5, 1954, that no triable issues of fact exist in the above-entitled matter, precluded Defendant, Exchange Lemon Products Company, from offering any evidence in the case. Therefore, pursuant to permission granted by the Court at said hearing, defendant hereby submits its written offer of proof in said case.

Defendant Hereby Offers to Prove the following facts, by and through the testimony of the witnesses herein indicated, and hereby represents to the Court that if said witnesses had been called and allowed to testify, their testimony would have been substantially as herein set forth (the same being substantially the form of statements of such witnesses taken in the course of preparation for trial of said matter): [80]

### TESTIMONY OF TOM BORDEN

Q. Please state your name and address.

A. Thomas C. Borden, 1090 East Second Street, Norco, California.

Q. What is your occupation?

A. Traffic Manager for Exchange Lemon Products Company.

Q. What do your duties consist of as Traffic Manager of Exchange Lemon Products Company?

A. Routing and shipping of all products from

(Testimony of Tom Borden.)

our plants at Corona and Covina, obtaining the facilities of warehouses at points distant from Corona, handling all rate cases or rate application with the carriers and other factors incidental to those.

Q. Are you the only person in your department or are there others?

A. At the present time there are 12 others in my department.

Q. When did you first become the Traffic Manager of Exchange Lemon Products Company?

A. In January 1, 1941.

Q. And what did you do prior to that time?

A. Prior to 1941 I was in various types of business. I was in the warehouse business in Sterling, Colorado, for seven years.

Q. Calling your attention to a document marked Exhibit A, and attached to the pretrial order in this action, which is an insurance policy of The Home Insurance Company issued to insure the Exchange Lemon Products Company, I'll ask you, Mr. Borden, if you recognize this policy?

A. I do.

Q. Did you have anything to do with negotiation or preparation? A. Yes.

Q. Did you know Mr. James S. Jennings?

A. Yes, I did.

Q. To your recollection, when did you first meet Mr. Jennings? [81]

A. I met Mr. Jennings in Mr. Hall's office probably—

(Testimony of Tom Borden.)

Q. Who is Mr. Hall?

A. The former General Manager of Exchange Lemon Products Company.

Q. Please continue.

A. Mr. Hall introduced Mr. Jennings to me possibly three or four years prior to the time that this policy was issued.

Q. Did you have any dealings with Mr. Jennings at that time?      A. Not particularly.

Q. Do you recall when this particular policy was discussed, if it was discussed, between yourself and Mr. Jennings?      A. Yes.

Q. When was that?

A. As I recall it was the latter part of January or the first of February in 1946.

Q. How were negotiations for the policy (Exhibit A) commenced, if you know?

A. Mr. Jennings contacted Mr. Hall first.

Q. When did you first hear of the policy or of the proposed policy?

A. The latter part of January or the first of February, 1946.

Q. When was the first time you talked to Mr. Jennings about it?      A. At that time.

Q. And where did the first meeting take place at which you talked to Mr. Jennings about the policy?      A. In my office.

Q. Who was present at that meeting?

A. Mr. Jennings and myself.

Q. Was Mr. Hall present?

A. No, Mr. Hall was not present.

(Testimony of Tom Borden.)

Q. Was anyone else present other than yourself and Mr. Jennings at this conversation?

A. No. [82]

Q. Can you state in substance what was said by Mr. Jennings and what was said by you at this first conversation?

A. Mr. Jennings mentioned that he had discussed with Mr. Hall a transportation policy which would cover all of our needs and Mr. Hall had told him that the proper person to discuss it with was me and that after we had arrived at some conclusion that he would take it up again—that he would take it up again with Mr. Jennings. Mr. Jennings explained the situation to me about the different forms of transportation policies and that he had a special form——

Q. May I interrupt you now? Don't say that he explained the different types of policies. That's a conclusion of yours as to what the substance of what he said was rather than saying what he said. Did he talk to you about a particular type of policy, and, if so, what?

A. He mentioned a policy that would cover all phases of our transportation.

Q. What else was said by Mr. Jennings at that time?

A. That this type of policy which he proposed would cover our products from the time they were loaded in the railroad car until they were delivered either to the customer or to a destination warehouse.

(Testimony of Tom Borden.)

Q. What do you mean by destination warehouse?

A. Destination warehouse is one from which merchandise is delivered directly to the consumer or the retail merchants or to large industries.

Q. Is there any other type of warehouse? In other words you use the term, "destination warehouse." Does that mean a warehouse different from any other warehouse?

A. Yes. There are transit warehouses.

Q. What do you mean by transit warehouses?

A. Transit warehouses are strategically located in various parts [83] of the country where merchandise can be moved from one point, stopped in transit while still in the due course of transportation, and stored until at a future date when the demand or market is ample to take care of the product.

Q. Well, actually, Mr. Borden, these transit warehouses are storage warehouses. What is the difference between those and what you call destination warehouses? Aren't they actually the same?

A. Physically, yes, but actually a very complete system of records is kept of all merchandise that are placed in transit warehouses so that at a future date when the shipper desires to forward his merchandise on to its ultimate destination he can do so without being penalized with an arbitrary rate.

Q. What do you mean by being penalized with an arbitrary rate?

A. The difference between the through rate from the point of origin to point of final destination and

(Testimony of Tom Borden.)

the rate from point of origin to the transit point and then the rate from the transit point on to destination.

Q. Did Mr. Jennings make any reference to these transit warehouses at the time of your first conversation with him?      A. Yes.

Q. What did he say regarding transit warehouses?

A. He said that up to that time although we had not used the storage in transit that in the future our business might be such so that we would require storage in transit.

Q. Did he say anything regarding whether or not the policy which he proposed would cover goods while stored in transit?      A. He did.

Q. What did he state in that regard?

A. He said that, as we were growing, it would be necessary for us to have a policy that we would be amply covered and secure in knowing that our merchandise was well taken care of, [84] regardless of where stored.

Q. And did he say that this transportation policy would cover that risk?      A. He did.

Q. Was there anything else stated at your first meeting with Mr. Jennings?

A. Not that I can recall.

Q. Did you have any subsequent conversations with Mr. Jennings regarding this policy?

A. Yes.

Q. When was the next conversation that you had with him?      A. Possibly two weeks later.

(Testimony of Tom Borden.)

Q. Where was that?

A. That was on the telephone.

Q. And you were where?

A. I was in Corona.

Q. And he was where?

A. At his office in Glendale.

Q. What was said on that occasion by you and what was said by him, in substance?

A. Mr. Jennings said that he had the articles drawn up that he thought should be incorporated in the policy and that he read them to me over the telephone.

Q. Were those the same provisions that are contained in the typewritten portion of the policy?

A. Substantially, yes.

Q. And what did you say?

A. I told him that I would like to see them before they were added to the policy.

Q. Were they sent to you?

A. Mr. Jennings brought them out on one of his trips a short time later. [85]

Q. Did you talk to him at that time?

A. I did.

Q. What did he say then?

A. He said that he was not sure whether The Home Insurance Company would accept these provisions as a rider to the policy but that he would do his best to get them to do so.

Q. Did he give you a copy of the rider at that time or proposed rider?           A. No.

Q. Did you look at it at that time?



(Testimony of Tom Borden.)

A. I did, and he explained it to me.

Q. Did he say anything at that time with regard to storage in transit?

A. No more than he had previously.

Q. Did he repeat what he had previously said?

A. Yes.

Q. And that was what?

A. That this would cover our merchandise from the time it was loaded in Corona until it was delivered at final destination.

Q. And he used that term final destination?

A. That's right.

Q. Did he make any specific reference to the fact that it would include in transit storage? Or are you implying it simply from his use of the term final destination?

A. No. Mr. Jennings used the words storage in transit.

Q. And what did he say in that regard?

A. That this policy covered all merchandise from the time it left our shipping point at Corona, stored in transit and until delivered at final destination.

Q. Mr. Borden, did you notice the provision in the typewritten portion of the policy which states, "This policy covers while on docks, wharfs, piers, bulkheads, in depots, warehouses, [86] stations and/or on platforms, but only in due course of transit and not if such property is in storage"?

A. That's right.

Q. Did you ask Mr. Jennings about that latter part, "not while such property is in storage"?

(Testimony of Tom Borden.)

A. I did not.

Q. Did he comment with regard to this particular provision, in other words, did he point out that provision and say anything?

A. Not that I remember.

Q. Was any particular comment made with regard to the use of the term warehouses in the provision that the goods were covered while in, among other things, warehouses? That is at the time you looked at the rider did he point to it or did you point to it and have anything to say in regard to it?

A. He said that that covered all phases of our transportation or that would cover all phases of our transportation.

Q. That's looking at the word warehouses or looking at the whole rider?

A. At the whole rider.

Q. Did you have any further conversation with Mr. Jennings regarding this policy?

A. Only on the telephone.

Q. Do you remember those conversations?

A. He called me possibly the middle of April and told me that he had not received the policy back from The Home Insurance and that he was a little dubious if the company would accept the rider.

Q. Did he comment with regard to any particular portion of the rider?           A. No.

Q. Did he state what he was worried about the company not [87] accepting?

A. He said that the reason he was doubtful was

(Testimony of Tom Borden.)

that the policy was all-inclusive and they might figure it was a one-way deal.

Q. Did you have occasion to talk to him at any subsequent time?      A. Yes.

Q. When was that?

A. A short time later he called me and told me the policy had been returned and that he would bring it out to Corona.

Q. Did he bring it out to Corona?

A. He did.

Q. And is this the policy he brought out?

A. That's right.

Q. Now, is the transportation rider, as it appears on this typewritten portion of this policy, identical to the form which Mr. Jennings originally showed you?      A. Yes.

Q. You say it is identical. Do you have a copy of the original form he submitted to you?

A. Only the one that is in this policy.

Q. When he came out and had a rider he was going to send back to the company, do you know the company accepted that rider or did the company make changes in the rider?

A. I cannot answer that.

Q. Did Mr. Jennings indicate that this was the same rider which——      A. He did.

Q. He said they have accepted the rider which he prepared?      A. Identically.

Q. He expressly represented that to you?

A. That is correct.

Q. As far as you know, is there any difference

(Testimony of Tom Borden.)

between the rider which appears on this policy and the one which he showed you? [88]

A. There is not.

Q. Did you review this rider when the policy was received?      A. I did.

Q. Was anything further stated at that time with regard to the question of whether the policy insured goods while stored in transit?

A. No.

Q. Mr. Borden, are there other persons situated similarly to yourself, that is, traffic managers, with other companies?

A. Yes; all large shippers have traffic managers or persons performing such duties.

Q. Are there any associations or trade organizations of traffic or transportation personnel?

A. Yes. Traffic clubs, transportation clubs.

Q. Are those on a local or national level?

A. They are on both. Local clubs are generally affiliated with the Associated Traffic Clubs of America.

Q. Are there any trade publications of the transportation trade?

A. Yes; the chief of which is the *Traffic World*.

Q. Is that a national publication?

A. It is.

Q. What does it contain?

A. It contains court decisions, decisions of the Interstate Commerce Commission, and pertinent facts and information relative to different modes

(Testimony of Tom Borden.)

and types of transportation which is of interest to the traffic man only.

Q. During the period from 1941 to the present, was Exchange Lemon Products Company engaged in the transportation trade?      A. Yes.

Q. Would you amplify that answer?

A. By way of illustration, in 1953 we shipped approximately 950 cars of products in interstate commerce by rail carriers; [89] in 1946, 125 cars.

Q. Mr. Borden, is there any peculiar trade usage or meaning in the transportation trade of which you are aware for the term "transit" or "in transit"?      A. Yes.

Q. Would you state what that meaning is?

A. The term is used generally to apply to goods shipped or held pursuant to transit provision of the railroad freight tariffs which are lawfully on file with the Interstate Commerce Commission. Thus, goods are referred to in the trade as being in transit until they reach their final destination, from point of origin to final destination.

Q. Now, Mr. Borden, with respect to the loss upon which the claim of Exchange Lemon Products Company in this litigation is based, are you familiar with the proof of loss which was filed with the insurance company and which is attached as Exhibit A to the Answer to the Complaint?      A. I am.

Q. Mr. Borden, I note that of the one hundred sixty-odd thousand dollars worth of product for which the claim is made in excess of \$128,000.00 was in fifty-gallon barrels. It is referred to as No.

(Testimony of Tom Borden.)

323, Calamona concentrated lemon juice. Could you explain what that product is and the circumstances under which it was held at Crooks Terminal Warehouse?

A. Our product, No. 323, is preserved with sulphur dioxide and is a concentrated lemon juice which was produced for one customer only, located in Chicago, Illinois. This product had to be produced at the time we had sufficient supplies of raw material to insure this customer of an ample supply the following season. When this product was produced in 1950, we had an ample supply of lemons come in the latter part of the summer and early fall, so we were able to produce a [90] substantial amount of his requirements several months prior to the time it was needed. Due to lack of storage facilities near our plant or at our plant, it was much more economical to store in transit at Crooks Terminal Warehouse at Kansas City to be forwarded on at a later date and as ordered by this customer.

Q. Were there no firm shipping instructions or orders on this product at the time of its destruction?

A. No. There were no orders for this merchandise at the time, although there was a definite understanding between the two companies relative to the minimum amount of concentrated juice that would be required during the following season, and that we were to supply the necessary concentrate.

(Testimony of Tom Borden.)

Q. Were these barrels marked in any particular manner so as to designate them to the one customer?

A. These barrels had their heads painted white and stenciled Puritan Company of America, Chicago, Illinois.

Q. Puritan Company of America is the one customer you referred to?      A. That is correct.

Q. Now the balance of this claim is a product, No. 319, being 5,942 cases. What is that product?

A. That is a concentrate for lemonade packed in small tins for the consumer trade.

Q. This product then could just as well been sold in Kansas City as any place else?

A. Yes; some of it was sold in Kansas City.

Q. Do you mean some of the products out of Crooks Terminal Warehouse was sold in Kansas City?      A. That is right.

Q. Doesn't that mean that that product had reached terminal storage in Kansas City? [91]

A. No; not that portion.

Q. Would you explain your answer?

A. When products are shipped to a transit point, a record is kept by the carriers or an agency designated by them for keeping records of all transit merchandise entering that locality. It is permissible to release any portion of any transit tonnage by advising the carrier of the amount to be released but any amount that is released cannot be reinstated into transit tonnage again. When this tonnage is released in a warehouse, it is immediately placed

(Testimony of Tom Borden.)

with distribution stocks separate from the tonnage remaining for transit purposes only.

Q. In other words, the transit tonnage is physically segregated?      A. That is right.

Q. Who is the agent of the carriers for purposes of registering transit stocks in Kansas City?

A. Western Weighing and Inspection Bureau.

Q. And were all of the stocks covered by your claim at the time of their destruction registered with Western Weighing and Inspection Bureau as transit goods?

A. All the stocks that are in this claim were registered with the Western Weighing and Inspection Bureau as being in transit at that time.

Q. Did you, in fact, suffer loss to any similar products in Kansas City at that time, which loss was not included in this claim?      A. Yes.

Q. And why were those stocks not covered by this claim?

A. Because they were distribution stocks and were not in transit.

Q. When you say they were not in transit, you use the word in what sense?

A. That they were not still in the due course of transportation as interpreted by the trade. [92]



TESTIMONY OF C. S. CONNELLY

Q. Will you state your name and residence address?

A. C. S. Connelly. I reside at 3470 Berry Drive, North Hollywood.

Q. And your occupation, Mr. Connelly?

A. General Traffic Manager for the Carnation Company.

Q. That is in Los Angeles, is it?

A. Yes, sir; in Los Angeles. My office is in the Carnation Building at 5045 Wilshire Blvd.

Q. How long have you held that position, Mr. Connelly?

A. I have held my present position for the past fifteen years and prior to that time I was Western Traffic Manager for the Carnation Company in Seattle, Washington, and prior to that I was General Traffic Manager of Albers Milling Company and held that position at the time Carnation Company purchased the Albers Milling Company.

Q. Do you have any experience in the transportation trade prior to the time that you went with the Albers Milling Company?

A. Prior to the time I was employed by the Albers Milling Company I was with the United States Railroad Administration.

Q. During what period of years was that?

A. I left the Railroad Administration in May, 1923, to take employment with the Albers Milling Company on June 1, 1923.

Q. Would you state generally the nature of your duties at Carnation Company?

(Testimony of C. S. Connelly.)

A. I have full supervision of all matters pertaining to transportation. That includes raw materials brought into the plants, the outbound products, warehousing of the outbound products. In fact, everything that pertains to our transportation comes under my supervision.

Q. Is your type of business such that there is an association or grouping of transportation men, that is, is it an occupation or trade which has men in similar positions in other companies? [93]

A. Yes.

Q. And do you have associations of traffic men in the United States?

A. We have the national organization known as the National Industrial Traffic League and the membership of that league is composed of men who occupy positions similar to mine in other companies throughout the United States.

Q. Are there any publications put out particularly for or by traffic men?

A. Well, the league puts out a weekly bulletin showing important happenings in the transportation field during that week and they also put out another publication called the Legislator which deals with changes in legislation affecting transportation. The Traffic World is a national publication devoted to transportation and is largely read by the traffic men throughout the country.

Q. Mr. Connelly, among traffic men engaged in the trade, is there any generally accepted usage of

(Testimony of C. S. Connelly.)

which you are aware for the term "transit" or "in transit"?

A. Yes; we generally use and interpret the word "transit" as meaning goods shipped subject to the transit privilege.

Q. Would you explain briefly what you refer to by "transit privilege"?

A. Yes. I will take grain, for example, and transport the grain to a storage or milling point and under the railway tariffs the shipper is privileged to unload the grain and record the inbound freight bill covering that grain for what is known as a transit privilege. Under the transit privilege, the shipper or owner of the grain can mill the grain or clean it or something of such sort and then reship it to another destination and, under the tariff governing the transit privilege, the shipper is accorded the through rate from the [94] origin of the grain to the final or ultimate destination. The tariffs sometimes make a charge for the privilege and sometimes no charge is made, depending on the circumstances.

Q. Is the transit privilege restricted to stoppage for processing or reprocessing of the goods?

A. No. Transit privileges cover a wide number of uses at the stoppage point. I would say the fabrication of iron and steel articles, or storage of canned goods, are among other normal transit uses. The transit privileges cover a host of different operations at the transit point. The particular transit

(Testimony of C. S. Connelly.)

privilege is dependent upon the provisions of the specific applicable tariff.

Q. To your knowledge, Mr. Connelly, is this trade usage of the term "transit" of general and widespread notoriety among traffic men?

A. Yes.

Q. At this time I would like to ask you a hypothetical question—that is, a question based on a hypothetical set of facts, which I would like you to answer on the basis of your experience and knowledge in the specialized transportation field in which you work.

Assume that X Company is a California shipper of substantial quantities of consumer goods throughout the United States. Y Company, in Chicago, is one of the major customers of X Company. Y Company is the only customer for the particular goods which it purchases from X Company, at least in the container here involved. Assume further that X Company ships a large quantity of the product normally sold to Y Company, together with some other general consumer goods, to a warehouse in Kansas City. All of the goods are shipped on bills of lading naming X Company as consignee and are marked, "Registered for Storage in Transit." These goods [95] are unloaded in Kansas City, are registered with the carrier's agent as subject to transit privileges contained in the applicable tariff. Assume that they have remained in the warehouse for eight to twelve months and no shipping instructions have

(Testimony of C. S. Connelly.)

been received, there being a two-year limit on the transit privilege in the applicable tariff.

Now, with those facts in mind, assume that it becomes material to determine whether the goods in question are "in due course of transit." As the term is used and understood generally in the transportation trade, can you state, in your opinion, whether those goods are "in due course of transit"?

A. I would say that the goods are "in transit" since the goods were properly registered under the tariffs for the transit privilege. [96]

#### TESTIMONY OF HAROLD S. SCOTT

Q. Please state your name and residence?

A. Harold S. Scott, 627 Comstock Avenue, Whittier, California.

Q. And your occupation, Mr. Scott?

A. Western Traffic Manager for the Quaker Oats Company.

Q. Will you describe briefly the nature of your duties as Western Traffic Manager for the Quaker Oats Company?

A. My duties are supervision of traffic of the Quaker Oats Company, principally transit operators. That includes all Quakers Oats Products, flour milling, feed mixing, also I have some dealings with Coast Fisheries, a subsidiary of our company, who is shipping canned goods.

Q. How long have you been in the transportation business?

A. Since 1919, that's 34 years.

(Testimony of Harold S. Scott.)

Q. Have you been with the Quaker Oats Company all of that time?      A. Yes, sir.

Q. And how long have you been the Western Traffic Manager?

A. I was appointed to that position February 1, 1954. Prior to that time I had similar duties in the General Office of the Quaker Oats Company in Chicago. I was their top rate man in the Chicago Office which supervised transit all over the country.

Q. Mr. Scott, in the course of your work in the transportation business, have you had occasion to familiarize yourself with railway rate tariffs and operations thereunder?

A. Since being with the Quaker Oats Company, that's been one of my principal duties. I started out learning tariffs and before long was specializing in one territory and afterwards was given more or less general supervision over traffic in all sections of the country. I've appeared before Rate Committees in regard to rate dockets and am very familiar with all transit practices. [97]

Q. Are you familiar with the so-called transit privilege provisions of the railway freight tariffs?

A. Yes, I'm familiar with the transit tariffs in all sections of the country, including Canada.

Q. Do they follow a general pattern similar throughout the various applicable tariffs?

A. They do follow a general pattern. Usually we have followed the practice of trying to handle them more or less uniform throughout the country.

(Testimony of Harold S. Scott.)

Q. Would you describe briefly what the operation of the transit privilege provisions of the railway freight tariff are?

A. Well, under "transit" provisions in the tariffs, products are moved into a mill, warehouse, storage point or other manufacturing point and are unloaded into such places and the freight bills are recorded and kept on record by the transportation companies until such goods are moved out to their final destination.

Q. What is the purpose of establishing this transit provision?

A. The principal purpose of transit is to maintain competitive conditions in all milling sections. For example, the man at the terminal point would have an advantage over a man at an interior point without transit.

Q. Now, from an historical standpoint, do you know whether transit was originally for storage or for stoppage to process goods?

A. From my recollection, the original transit was for taking raw products and converting them into products. The question of storage in transit has been more or less opposed by the carriers on occasion and they have tried to distinguish between storage and milling, but now, generally throughout the country all such transit involves storage, converting into products or otherwise shipping into and out of a transit point. [98]

Q. And by "storage in transit," you refer to what type of an operation?

A. Storage in transit means a shipment of a

(Testimony of Harold S. Scott.)

commodity or material into a point and reshipping the same material without otherwise treating it at the transit point.

Q. Now you refer in your answer to the word transit to describe this practice of shipping, unloading, processing or holding and then reshipping goods. Is this an abbreviation of your choosing or is it a generally accepted and understood usage of the word among transportation men?

A. It is general usage among traffic men.

Q. At this time I would like to ask you a hypothetical question—that is, a question based on a hypothetical set of facts, which I would like you to answer on the basis of your experience and knowledge in the specialized transportation field in which you work,

Assume that X Company is a California shipper of substantial quantities of consumer goods throughout the United States. Y Company, in Chicago, is one of the major customers of X Company. Y Company is the only customer for the particular goods which it purchases from X Company, at least in the container here involved. Assume further that X Company ships a large quantity of the product normally sold to Y Company, together with some other general consumer goods, to a warehouse in Kansas City. All of the goods are shipped on bills of lading naming X Company as consignee and are marked "Registered for Storage in Transit." These goods are unloaded in Kansas City, are registered



(Testimony of Harold S. Scott.)

with the carrier's agent as subject to transit privileges contained in the applicable tariff. Assume that they have remained in the warehouse for eight to twelve months and no shipping instructions have been received, there being a two-year limit [99] on the transit privilege in the applicable tariff.

Now, with those facts in mind, assume that it becomes material to determine whether the goods in question are "in due course of transit." As the term is used and understood generally in the transportation trade, can you state, in your opinion, whether those goods are "in due course of transit"?

A. I would consider those goods "in transit" as long as the bills remain recorded with the transportation company and the shipper had shown his intention to ship them to a destination.

Q. Does your answer apply equally to the general consumer goods as to those normally produced for Y Company?

A. Yes. [100]

## TESTIMONY OF JAMES S. JENNINGS

(Excerpts from deposition taken at Glendale, California, March 24, 1954, at the request of counsel for Plaintiff, The Home Insurance Company.)

## JAMES S. JENNINGS

having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Menzies:

Q. Will you please state your name, Mr. Jennings?      A. James S. Jennings.

Q. What is your business or occupation, Mr. Jennings?

A. I am retired through disability.

Q. At one time were you an agent with the Home Insurance Company in New York?

A. I was.

Q. At any time did you write a policy for the Exchange Lemon Company, a corporation?

A. It is the Exchange Lemon Products.

Q. Products, that's right, sir.

A. I wrote many policies for them.

Q. Well, did you ever write or cause to be written a transportation policy No. 338460?

A. I wouldn't be sure of the number. I wrote a transportation policy for them.

Q. I show you here the original policy that Mr.

(Testimony of James S. Jennings.)

Stark has been kind enough to hand me and ask you whether or not that is——

Mr. Stark: That is the same policy, Mr. Menzies, a photostatic copy of which is attached to the pre-trial order as Exhibit A,

Mr. Menzies: Thank you.

The Witness: Yes, I remember this policy. I wrote the policy as an agent for the Home.

Q. I take it you had considerable experience in the traffic [101] problems?

A. I believe I was a traffic expert.

Q. Now, Mr. Jennings, how much experience have you had in the transportation field?

A. Take a long time. I started in 1916 at the time the Jennings-Cornwall Warehouse Company was built. It was then the Jennings-Hanna Warehouse Company, and under an uncle, James E. Jennings, I was trained in the warehouse business. I was going to school at the time but he used to have me at his house a great deal of the time at night and we would go over the correspondence, all of the reports and all of the operations, and I would go down there occasionally week ends, on Saturdays. Then after the First World War, I finally went to work there. I don't remember whether it was 1920—I guess it was—and I went through every department from the unloading, the loading, the warehouse goods, the trucking, the office, the records, the traffic, up to the superintendant, and then assistant manager. Then I came to Los Angeles in 1923 and I started the Jennings-Nibley Warehouse Company. My partner,

(Testimony of James S. Jennings.)

Nathan Nibley, had no experience whatever in that business. I managed that business till 1927, and in the fall of '27 I organized with The Citizens Truck Company, The Associated Shippers, consolidating freight from the East coast by water out here, and in 1928 and part of '29 I managed the office for the Western Traffic Conference, the Cotton Piecegoods Association, and also fully managed the Associated Shippers, which was by then owned by three trucking companies, The Pioneer, The California, and the Citizens Truck Company. I also operated a claims service personally, for those of our customers that I could get to use it and for which I charged a fee. Subsequently, in the insurance business, I discussed—I was called upon to [102] explain the liability of carriers at several meetings of men, including The Traffic Association of Los Angeles County, at which I made a speech one evening covering that point, the liability of carriers.

Q. Now, do you know whether or not there is any special meaning in the trade usage of the words "Storage in transit"?

A. Yes, I am very familiar with storage in transit. Our warehouse company in Salt Lake, along about '21 or '22, was able to secure a storage in transit privilege on sugar, and I personally supervised the handling—I would like to strike that from the record. I don't remember the date, but that was storage in handling. I personally was instrumental in working with a Mr. J. H. Cornwall in getting that rate established.

(Testimony of James S. Jennings.)

Q. Well, tell me what it means?

A. Storage in transit is a privilege given to a shipper, that he may move his merchandise out of the original point of shipment, stop it at a warehouse or plant, wherever he chooses, and then when and if he is ready to forward it on for an additional charge, he is able to move it at the through rate from the original point of shipment to the final destination, the theory being that the additional charge is considerably smaller than the charge would be for the two shipments. I don't remember exactly what we did get there on sugar. However, since that time I have explained it to many of our customers, and it is a standard practice.

Q. Well, then, as I gather it from your testimony here, that particular phraseology, as it applies to transportation, merely gives to the shipper the benefit of a rate differential?

A. Well, I can't answer that with a yes or no, because it gives to the shipper a chance to store in places that are cheaper, probably, than the destination. It gives him a chance to store [103] at a center where they can distribute to many places, and at the same time only pay this small differential for that privilege. They don't have to ship beyond at all. They can distribute right from wherever it is, or use it there, but it gives them that privilege.

Q. In other words, the meaning of the word, as I gather it, or the phrase, is a privilege to hold the goods and either ship or store?

(Testimony of James S. Jennings.)

A. I don't understand that hold the goods to ship or store.

Q. Well, they have the option there of shipping to a central location?

A. To any location that the railroad has granted a storage in transit privilege.

Q. That, I understand, is taken care of through some ICC regulations?

A. I imagine they are filed with the ICC and approved by them.

Q. Now, was that particular meaning of the phrase discussed with Mr. Jennings, Miss Tuthill—

A. You mean Mr. Hall?

Q. Mr. Hall, Miss Tuthill or Mr. Bordon?

A. Yes. Whether I was instrumental in explaining that to Mr. Hall originally for their shipments, I don't know. We discussed that many times. As far as discussing it with Miss Tuthill, I do not remember discussing it with Miss Tuthill.

Q. Did you discuss this particular policy and its phraseology with Mr. Bordon?

A. I did.

Q. What discussion did you have with him and what was said?

A. I remember being sent in to see him by Mr. Hall. I do not remember whether it was before or after this policy was written, but I had the form in my hand at the time, and I went over it with him. I also remember discussing storage [104] in transit with Mr. Bordon. For what purpose, I don't remember, but I remember going over it very carefully, storage in transit, with Mr. Bordon. Now, the

(Testimony of James S. Jennings.)

reason I remember, I was somewhat surprised at the questions he asked me concerning it.

Q. What questions did he ask you?

A. It is so long ago I can't remember his exact words, but they were primarily as to the usage of storage in transit.

Q. When you say the usage of it, what do you mean by that, sir?

A. Well, lots of people don't know about it and don't know what—how to get it, how to use it.

Q. How do you get it?

A. You go to a railroad and find out whether they are willing to grant it, if it hasn't already been granted. Then with their co-operation, they make the applications to file their rates as such, and they grant it, but if it isn't granted, you have to arrange through the railroad company to get it.

#### Cross-Examination

By Mr. Stark:

A. I don't remember discussing this policy with Mr. Bordon until we had the form written, because when I went in there, I had it. Whether it was on a policy or whether it was on my form, I don't remember.

Q. Now, you say on your form?

A. I typed up this form that has been typed on that policy by the Home. In other words, that form was worked over two or three times before it went to the Home for their approval. [105]

The foregoing offer of proof is hereby respectfully submitted as a part of the District Court record in this matter.

Dated October 11, 1954.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Defendant, Exchange Lemon Products Company, Donald D. Stark.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 12, 1954. [106]

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[Title of District Court and Cause.]

#### MEMORANDUM OF DECISION

On April 23, 1946, plaintiff, The Home Insurance Company, issued to the defendant, Exchange Lemon Products Company, a transportation insurance policy whereby, subject to the terms and conditions of the policy, plaintiff insured defendant against loss or damage to its products. On various dates between May 3, 1950, and August 22, 1950, defendant shipped certain citrus by-products from Corona, California, consigned to the defendant for "storage in transit" at Crooks Terminal Warehouse, Kansas City, Missouri. For a period of approximately one year these products were maintained in said warehouse for the account of defendant and were still awaiting further shipping orders when, on July 13,



1951, and while the policy was in full force and effect, they were totally destroyed by a flood. Defendant filed a timely proof of loss with the plaintiff and demanded \$161,991.63 as the value of the products destroyed. Plaintiff refused payment and now seeks from this court a declaration of rights, duties and liabilities of the parties [108] under the policy. Defendant has filed a counter-claim and prays for a judgment in the amount of its claimed loss with interest and costs.

It is plaintiff's contention that at the time of their destruction, defendant's products were not insured under the policy. The basis for this contention is the provision of the policy reading: "This policy covers \* \* \* the insured property \* \* \* only while in due course of transit and not if such property is in storage."

At the pretrial hearing the parties stipulated to the facts and agreed that there were no issues of fact for trial unless " \* \* \* the court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term 'in due course of transit.' "

When the case was called for trial the plaintiff objected to defendant's proffered evidence of trade usage in the transportation trade, and the court sustained the objection. Thus, there were no issues

of fact for trial, and in accordance with the pre-trial agreement of the parties no jury was impaneled.

The primary question of law is the interpretation of the contract of insurance. This is a diversity case and California law is applicable. *Erie R. Co. v. Tompkins*, 304 U. S. 64. The parties concede that the products were in storage at the time of their destruction and the policy specifically provides that it does not cover when the property is in storage. To avoid the effect of this specific provision of the contract, defendant seeks to introduce [109] evidence of trade usage in a trade in which neither of the parties is engaged, for the purpose of establishing that by the use of the term, "in due course of transit," the parties intended that the policy should cover when the property was in a certain kind of storage, even though the contract expressly provides that it shall not cover if such property is in storage.

The law is clear that evidence of trade usage may be admitted to define a word or term used in a contract. *Myers v. Tibbals*, 72 Cal. 278, 13 p. 695; *Higgins v. California Petroleum & Asphalt Co.*, 120 Cal. 629, 52 p. 1080; Cal. Code Civ. Proc., Secs. 1861 and 1870 (12); Cal. Civ. Code, Sec. 1644. And there is no requirement that the word or term sought to be defined be obscure or ambiguous. *Ermolieff v. R. K. O. Radio Pictures, Inc.*, 19 Cal. 2d 543, 122 p. 2d 3, 6; *Body-Steffner Co. v. Flotill Products*, 63 Cal. App. 2d 555, 147 p. 2d 84; 55 Am. Jur. Sec. 37, page 299; 89 A. L. R. 1228.

Trade usage in a particular trade is admissible where both parties are engaged in that trade. In such a case the parties to the contract are deemed to have used the disputed term according to the meaning or sense it bears in the trade. As stated in *Restatement of Contracts*, Section 248, page 532: "Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention." That the instant action is not such a case is clear, for plaintiff is engaged in the insurance business and defendant in the business of marketing citrus products. [110]

The question of admissibility of evidence of trade usage may arise where one of the parties is engaged in the trade whose usage is sought to be admitted and the other is not. The rule in such a case was thus stated in *Latta v. DaRoza*, 100 Cal. App. 606, 280 p. 711; "To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence." *Lynch v. Bekins Van & Storage Co.*, 31 Cal. App. 68, 159 p. 822, and *Wigmore on Evidence*, 3rd Ed., Vol. IX, Sec. 2464, p. 209, are in accord. In the instant case, defendant alleged a usage for the term, "in due course of transit," in the transportation

trade, and plaintiff's knowledge thereof. As already noted, neither of the parties is engaged in that trade. However, defendant erroneously contends that, as a shipper it is engaged in the transportation trade. The mere fact that one arranges for the transportation of property does not mean that such person is engaged in the transportation trade any more than everyone who has a bank account could be deemed to be engaged in the banking trade within the meaning of the rule.

In its counter-claim, the defendant alleges, "The term 'in due course of transit' has a trade usage in the transportation trade, to wit: shipped in compliance with the transit privilege provisions of the railway tariffs authorized by the Interstate Commerce Commission, which includes what is known as 'transit storage' or 'stoppage in transit' as distinguished from local or terminal storage." Defendant also avers that the goods destroyed on July 13, 1951, were stored under the transit privilege provisions of said railway [111] tariffs. Further, it is alleged that the policy was negotiated between James S. Jennings, plaintiff's agent, and Thomas C. Borden, defendant's traffic manager, and that both persons knew of the trade meaning of the term, "due course of transit," and discussed the same in connection with negotiations for the policy.

Assuming the truth of these allegations, they establish another fundamental reason why evidence of trade usage is not admissible in this case. The defendant alleges that the goods were placed in

storage under the transit privilege provisions of the railway tariffs authorized by the Interstate Commerce Commission, and that the privilege provisions included the right to storage in transit.<sup>1</sup> The railway tariffs and the transit privilege provisions authorizing storage in transit relate to the published schedule of rates and charges and are a part of the contract between the freight carrier and the shipper, but have nothing to do with contracts of insurance between the shipper and an insurer. The privileges referred to permit the shipper to remove stocks from the channels of transportation, maintain such stocks in storage for a period and thereafter return them to the channels of transportation without losing the benefit of long-haul rates. If, as alleged in the counter-claim, the agents of the parties knew of and discussed the transit privilege provisions of the applicable railway tariff and the likelihood of storage occurring, the insertion [112] in the contract of the express provision that the policy does not cover "if such property is in storage" is a clear indication that the parties intended to exclude the application of such usage from their contract. Under such circumstances the law is settled that evidence of trade usage is not admissible. The California Supreme Court in *Ermolieff v. R. K. O. Radio Pictures, Inc.*,

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<sup>1</sup>The applicable railway freight tariff was stipulated to and attached to the pretrial order. Storage in transit is included in the privilege provisions of this particular tariff. It is also noted that the bills of lading which are attached to the pretrial order are marked "Register for storage in transit."

supra, citing *New York Central R. Co. v. Frank H. Buck Co.*, 2 Cal. 2d 384, 41 p. 2d 547, states the rule: “\* \* \* where the terms of the contract are expressly and directly contrary to the precise subject matter embraced in the custom or usage, parol evidence of that custom or usage is not admissible.” Also see *Fish v. Correll*, 4 Cal. App. 521, 88 p. 489; *Withers v. Moore*, 140 Cal. 591, 74 p. 159; *Wigmore on Evidence*, 3rd ed., Vol. IX, Sec. 2440, p. 127; *Williston on Contracts*, Sec. 656; *Restatement, Contracts*, Sec. 247, comment (d), p. 350.

As stated by the United States Supreme Court, “This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom.” *Grace vs. American Central Ins. Co.*, 109 U. S. 278, 283.

The language of the contract is unambiguous and is fairly susceptible of but one interpretation. It is denominated a transportation policy and the parties intended it to cover the goods while being transported, “but not if such property is in storage.” At the time of their destruction and for approximately a year prior thereto, the goods were in storage and, therefore, not covered by the policy. [113]

The findings of fact and conclusions of law appearing in this memorandum of decision shall serve as findings and conclusions pursuant to Rule 52(a)

F. R. C. P. Counsel for plaintiff is requested to prepare, serve and lodge a formal judgment for settlement in accordance with local Rule 7.

Dated at Los Angeles, California, this 15th day of December, 1954.

/s/ WILLIAM M. BYRNE,  
United States District Judge.

[Endorsed]: Filed December 15, 1954. [114]

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United States District Court, Southern District of  
California, Central Division

No. 13878-WB

THE HOME INSURANCE COMPANY, a Cor-  
poration,

Plaintiff,

vs.

EXCHANGE LEMON PRODUCTS COMPANY,  
a Corporation,

Defendant.

### DECLARATORY JUDGMENT

The above-entitled cause came on regularly for trial October 5, 1954, before the Honorable William M. Byrne, Judge of the United States District Court, Southern District of California, Central Division, sitting without a jury; Thomas P. Menzies, Esq., appearing as counsel for the plaintiff, and Messrs. Donald D. Stark and E. Spurgeon Roth-

rock of the firm of Clayson, Stark and Rothrock, appearing as counsel for the defendant, Exchange Lemon Products Company, a corporation; and the parties having previously stipulated and agreed in the pretrial proceedings that there were no issues of fact for trial unless the court ruled as a matter of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term, "in due course of transit"; and the defendant having made an offer of proof with respect to said trade usage; and the court having ruled that evidence of said trade usage was not admissible; and the cause having been submitted to the court for decision; and the court having filed its memorandum of decision which included findings of fact and conclusions of law on the issues herein; and the court having directed that [115] its findings of fact and conclusions of law appearing in its memorandum of decision serve as findings of fact and conclusions of law pursuant to Rule 52 (a), F. R. C. P.;

Now, Therefore, in accordance with its findings of fact and conclusions of law,

It is Ordered, Adjudged and Decreed as and for the declaratory judgment of this court is as follows:

(1) That the loss from destruction by flood of the defendant, Exchange Lemon Products Com-



pany's products, while maintained in Crooks Terminal Warehouse in Kansas City, Missouri, is not covered by the policy of insurance issued by the plaintiff, The Home Insurance Company, a corporation, on April 23, 1946, and the plaintiff, The Home Insurance Company, is not obligated to bear or pay any part of the expense of the loss of said goods.

(2) That the defendant, Exchange Lemon Products Company, a corporation, take nothing by reason of its counter-claim on file herein.

(3) That the plaintiff, The Home Insurance Company, a corporation, is entitled to judgment against the defendant, Exchange Lemon Products Company, a corporation, for its costs incurred herein to be hereafter taxed in accordance with the rules of this court. Costs taxed at \$114.95.

Done in Open Court this 30th day of December, 1954.

/s/ WILLIAM M. BYRNE,  
United States District Judge.

[Endorsed]: Filed December 30, 1954.

Docketed and entered December 30, 1954. [116]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Exchange Lemon Products Company, defendant in the above-named action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 30, 1954.

Dated December 31, 1954.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of Mail attached.

[Endorsed]: Filed January 4, 1955. [117]

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[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

1. The court erred in refusing to impanel a jury or to allow introduction of any evidence;
2. The court erred in refusing to allow introduction of evidence on the issue of trade usage;

3. The court erred in refusing to allow introduction of evidence on the issue of ambiguity of the insurance contract.

Dated January 4, 1955.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Defendant-Appellant Exchange  
Lemon Products Company.

Receipt of copy acknowledged.

[Endorsed]: Filed January 13, 1955. [118]

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[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 120, inclusive, contain originals of Complaint; Answer to Complaint, Counter-claim and Demand for Jury Trial; Amended Answer; Amended Counter-claim; Answer to Amended Counter-claim; Pre-trial Order; Offer of Proof; Memorandum of Decision; Declaratory Judgment; Notice of Appeal; Appellant's Statement of Points; and Designation of Contents of Record on Appeal, which constitute the transcript of record on appeal

to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of February, 1955.

EDMUND L. SMITH,  
Clerk;

By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 14657. United States Court of Appeals for the Ninth Circuit. Exchange Lemon Products Company, a Corporation, Appellant, vs. The Home Insurance Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 12, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14,657

THE HOME INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

EXCHANGE LEMON PRODUCTS COMPANY,  
a Corporation,

Defendant.

APPELLANT'S ADOPTION OF DESIGNA-  
TION OF RECORD AND STATEMENT OF  
POINTS

Pursuant to the provisions of Rule 17 (6) of the above-entitled court, appellant hereby adopts as though set forth herein in full the designation of contents of record on appeal and the statement of points, both dated January 3, 1955, filed with the United States District Court and made a part of the typewritten transcript on file herein.

Dated: February 18, 1955.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Appellant.

[Endorsed]: Filed February 19, 1955.

Affidavit of Service by Mail attached.

[Title of Court of Appeals and Cause.]

### STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated by the parties to the above-entitled appeal, by and through their respective counsel, that the record on appeal be printed in accordance with the designation heretofore filed, except with respect to Exhibits "B" and "C" attached to the pretrial order, which shall be modified as follows:

(a) Exhibit "B"—It is stipulated that said exhibit contains copies of the bills of lading and pre-paid freight bills covering the goods destroyed. Said bills are substantially identical except for variations not material to this appeal. Therefore, it is agreed that the record on appeal need contain only a copy of (1) the bill of lading, dated May 30, 1950, and (2) the prepaid freight bill of said date.

(b) Exhibit "C"—This exhibit contains a copy of the applicable freight tariff (No. 403-B) and its supplement (No. 25). Only the following items from said tariff need be reproduced as a part of the record on appeal, it being agreed that the remainder of said exhibit is not material to the appeal:

(1) Freight Tariff No. 403-B:

Item 50 (Note 3 only).....	Page 5
Items 55, 60 and 65.....	Page 5
Items 75 and 80.....	Page 6

(2) Supplement No. 25, Freight Tariff No.  
403-B:

Item 70-I (Note 10 only).....Page 5

Dated March 22, 1955.

CLAYSON, STARK &  
ROTHROCK,

By /s/ DONALD D. STARK,  
Attorneys for Appellant.

/s/ THOMAS P. MENZIES,  
Attorney for Respondent.

[Endorsed]: Filed March 24, 1955.

